



OVERTIME CARGO POLICY: THE LAW, PRACTICE AND ITS IMPACT ON PORTS' STAKEHOLDERS

BACKGROUND

In order to avoid the Consignees of Cargo turning the Port into a dumping ground for their Cargo storage leading to Ports Congestion and other logistic challenges, the Nigerian Government came up with the Overtime Cargo Policy codified in the Nigerian Customs & Excise Management Act (CEMA) Cap C45, Laws of the Federation of Nigeria, (LFN) 2004 to regulate and provide the timeline within which Consignees are required to clear and take delivery of their Cargo from the Ports. Where a Consignee fails to process clearance of his Cargo within the specified period owing to some challenges such as finance to pay duty and other charges; late commencement of clearance documentation; failure to provide relevant documentation; false or under declaration of value of consignment; deliberate mischief or some other causes, the Nigerian Customs Service (hereinafter “the Customs”) would declare same as an Overtime Cargo in compliance with certain procedures. The Overtime Cargo would then be taken out of the Port Terminal to Government Warehouse (usually Ikorodu Lighter Terminal) for storage and eventual auctioning.

This Article sets out to review the Law governing Overtime Cargo Policy, the practical application of same, its impact on the stakeholders such as the Terminal Operators, the Shipping Companies and the Consignees. The Comment/Conclusion part will analyze the current position of the law and practice and proffer some solutions.

The Legal Framework

The principal legislation governing the activities of the Customs is the CEMA Cap C45, LFN 2004.

Section 31 of CEMA addresses the question on whether the Nigerian Customs Service has the right to declare containers as overtime. The provisions of Section 31 of the Customs and Excise Management Act stipulates thus:

(1&4) On the fifteenth day after the completion of discharge of the importing ship, aircraft or vehicle or at such times as the Board may direct, the proper officer shall, in respect of every ship, aircraft or vehicle, deliver to the person administering the area within which the discharge took place or, where there is no such person, to the owner of the ship, aircraft or vehicle, or his agent, a list of goods unloaded from such ship, aircraft or vehicle and not yet released or entered by the proper officer. (2) On the receipt of the list specified in subsection (1) of this section, the person administering the area, or where there is no such person, the owner of the ship, aircraft or vehicle, or his agent, shall immediately transfer all such goods to the Government warehouse or to such other place as the proper officer may approve. (3) If any person fails to comply with the provisions of subsection (2) of this section he shall be liable to a fine of four hundred naira.

The above reproduced provision of the law gives the Customs the right to forward uncleared cargo list to Terminal Operators or Shipping Companies directing them to transfer the affected goods to a Government warehouse or such other place as they deem fit for safe custody.

Subsection 9 of Section 31 on its part gives the Customs' Board the power to sell any goods removed to a government warehouse which has not been cleared by the importer within 14 days of their removal or such period as the Board may allow. This subsection is made without prejudice to the provisions of **Section 2 of the Customs and Excise (Special Penal and Other Provisions) Act** Cap 47 L.F.N., 2004 which gives the Board the power not to sell any goods over which chargeable duty or other charges are not paid within time but to distribute the goods to relevant government Departments and any remainder after distribution to be destroyed in line with the specifications of the Act.

It is important to consider the provisions of Section 97 of the CEMA which states that:

97(1) The provisions of this section shall have effect in relation to any goods which are deposited in a Government warehouse under or by virtue of any provision of this Act.

(2) Such rent shall be payable while the goods are deposited as may be fixed by the Board by notice in the Federal Gazette.

(3) If the goods are of a combustible or inflammable nature...

(4) Except as permitted by or under this Act, the goods shall not be removed from the Government warehouse until any duty chargeable thereon and any charges in respect —

(a) of their removal to the Government warehouse; and

(b) rent and expenses required to be paid under subsections (2) and (3) of this section, have been paid and, in the case of goods requiring entry and not yet entered, until they have been entered.

(5) The officer having the custody of the goods may refuse to allow them to be removed until it is shown to his satisfaction that all duties, expenses, rent, freight and other charges due in respect of the goods have been paid.

(6) If the goods are under or by virtue of any provisions of this Act sold, the proceeds of sale shall be applied in discharge of —

(a) firstly, any duty chargeable on the goods;

(b) secondly, the expense of sale;

(c) thirdly, any such charges as are mentioned in subsection (4) of this section;

(d) fourthly, any port or airport charges; and

(e) fifthly, the freight and any other charges, and if the person who was immediately before the sale the proprietor of the goods makes application therefore within one year from the date of the sale, the remainder, if any, shall be payable to him

(7) When the goods are under or by virtue of any provision of this Act authorized to be sold but cannot be sold for a sum sufficient to make the payments mentioned in paragraphs (a), (b) and (c) of subsection (6) of this section they may be destroyed, or otherwise disposed of as the Board may direct.

(8) If any goods are not cleared from the Government warehouse within a period of fourteen days after being entered, or after being sold under or by virtue of any provision of this Act, they may be disposed of in such manner as the Board may direct.)

In practice, if after 14 days as specified in Section 31(9) of CEMA, the Consignee has not cleared the goods, the Customs will usually give a grace period of 30 days within which the Consignee may take steps to clear and take delivery of the Cargo. If by the expiration of the 30 days grace period the Cargo remains uncleared, the Customs will then publish the cargo in an Official Gazette, as overtime Cargo to be auctioned and further issue a Notice advising the affected Consignees to take steps to clear same within thirty (30) days otherwise the containers would be auctioned. If after the expiration of the later 30 days' period contained in the Gazette, the affected cargoes are yet to be cleared and delivery thereof taken, the Customs shall then proceed to auction same through a dedicated E-Auction platform. Regrettably, the E-Auction platform appears not to have been active for some time now as available information indicates that auction of goods has not taken place in a while.

Payment of Accrued Demurrage & Storage Charges

The practice is that 25% of the proceeds from the auction sale would be remitted to the coffers of the relevant Shipping Company and/or Terminal Operator to offset accrued demurrage and storage charges on the cargo. However, most times the 25% of the amount realized is so negligible to cover the accrued demurrage and storage charges due to the length of time involved. This, in most cases, adversely impacts the interest of Shipping Companies and Terminal Operators who may feel shortchanged in the entire process namely, loss of container box for future business as a result of the detention of the cargoes, loss of space to accommodate new cargoes as a result of using the terminals for storage of overtime cargoes and finally loss of earnings arising from the paltry 25 per cent paid following an auction irrespective of the

amount of demurrage or storage charges that accrued. Lack of transparency and absence of a streamlined and cohesive process to forestall and administer overtime cargo incidents resulted in Ports' congestion.

Analysis of the Law

The foregoing provision of the law dictates the conditions that must be satisfied before goods within the custody of Customs officers are to be released. Section 97(5) empowers the Customs Officer to refuse to allow any goods to be removed from the warehouse until he is satisfied that all duties, expenses, rent, freight and other charges due on the goods have been paid.

The law saddles the Customs with the responsibility of ensuring that all relevant government charges including duty which have not been paid with respect to any cargo are settled before the goods are removed. The effect of this stipulation as captured in Sections 97(4) of CEMA appears to show that the Customs have no right to declare **any cargo as overtime if the duty over same has been paid**. This position gains more traction when the cargoes are not stored at a government warehouse but at private terminals where costs are incurred, and risk taken in the storage and protection of the cargo.

Section 97(6) which sets out the order of priority in which disbursements are to be made in the event of sale, further affirms the duty of the Customs in ensuring that duties, expenses, rent, freight and other charges due on the goods are paid before any balance realized from the sale of an overtime cargo are handed over to the Consignee provided he makes an application in that respect within one year after the sale. Accordingly, the practice of reserving 25% of the proceeds of sale to the Terminal Operators and Shipping

Companies runs contrary to the provisions of CEMA.

It is worthy to note that the provisions of Section 97(7) do pose a threat to the interest of Terminal Operators and Shipping Companies on grounds that the section requires the Customs to destroy any goods where the proceeds to be realized from sale of the goods will be insufficient to settle the duty, expenses of sale and other expenses. Consequently, the Customs may decide to jettison the freight, port and other charges incurred on the goods where the proceeds of sale appears to be inadequate to cover the first three items contained in Section 97(6) (a - c). Another disturbing provision is that of **Section 2 of the Customs and Excise (Special Penal and Other Provisions) Act** which gives the Customs' Board the power not to sell overtime goods but to distribute same to government Departments or even destroy them as the case may be. The implication of this is that the Terminal Operators and the Shipping Companies that may have rendered services to the cargoes may not be entitled to recover any accrued charges. It is the view that these provisions are no longer necessary in view of the fact that Port management is now in the hands of Private Investors as against what obtained previously, before the Port Concession exercise, when the Government was in charge and can afford to forfeit storage and demurrage charges.

To this end, it is necessary that the Terminal Operators and Shipping Companies are adequately protected to recover their storage and demurrage charges that accrue on overtime cargos by virtue of the provisions of Section 97(5) & (6). The Customs are by these provisions mandated to apply the proceeds of sale in settlement of the expenses incurred on the container as in the order of priority listed in Section 97(6). The Customs are not empowered to retain any part of the proceeds of sale

except that portion that remained after settlement of the charges and if the consignee has not applied for the retained balance to be paid to him/it in line with Section 97(6).

Conclusion

There is the need for collaboration between the Customs and other Ports' stakeholders on effective cargo management and overtime cargo administration with a view to decongesting the Ports. The Ports Stakeholders can engage the Transport Ministry and the Customs on the purport of Section 97 of CEMA accentuating the attendant loss of earnings and other challenges arising from overtime cargo policy and request for a Circular, Guideline or Regulation to be issued for effective implementation of Section 97(5)&(6) of CEMA. The envisaged amendment/re-enactment of CEMA should overhaul all other related enactments such as **the Customs and Excise (Special Penal and Other Provisions) Act** to align their provisions with the current Ports model in Nigeria. The review and overhaul of CEMA and other related Acts should also take into cognizance the challenges posed by overtime cargo and make provisions for consultation and a joint and collaborative administration of overtime cargo by the affected stakeholders and the Customs as well as providing for a strict regular and

transparent auction procedure to eliminate collusion and fraud.

The current timeline within which consignees are required to clear their cargoes or risk same declared as overtime appears to be short in the light of current challenges at the Ports. The Customs can by a Regulation introduce a more realistic timeline to address the current challenges pending when CEMA is amended or re-enacted. This will give the consignees some respite and comfort in sorting out any underlying issues delaying clearance of their cargoes.

The Shipping Companies may through their principals be required to inform the Consignees of the requirement of the law on timeline required to clear their cargo as well as consequences of not doing so which includes auctioning. In this regard, Consignees may be required to sign off a pre-shipment form before their cargo is accepted for shipment confirming their awareness of the Overtime Cargo Policy and entering into an undertaking to be bound by same. Customs and Ports' Stakeholders should embrace technology in cargo clearing process, by minimizing human physical interaction with stakeholders as an effective way of tackling issues relating to overtime cargo and Ports' congestion generally.

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